PAY DISCRIMINATION REVISITING THE CONCEPT & INTERNATIONAL PERSPECTIVES

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To Trisha for her encouragement,
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ABSTRACT

Sex based wage discrimination has received much attention especially in the late seventies and throughout the eighties. South Africa has had pay equality provisions in place since 1980 and specific legislation in 1988. Although no comprehensive gender based wage study exist prior to 1980, international surveys in those countries indicates that large wage gaps between the income of men and women existed.

This paper deals with possible reasons for gender bias perceptions and historical perceptions. The international perspective is dealt with on a comparative basis and possible reasons for success and failures are addressed.

The previous government's race discrimination policies had direct bearing; not only on the race disparities but on sex based wage inequality. Black people were barred from occupying certain positions in the public service. Black women were, therefore, effectively prevented from entering the higher income job market. This resulted in a concentration of black women in the lower income categories of work ie, domestic and home related work.

To measure the pay inequality, one has to have a comparator and this sometimes proves to be difficult. Women being concentrated in, for instance domestic jobs, have no male comparator to prove the existence of sex discrimination.

The tendency throughout the world is for employers to concentrate women into a job category and rate that specific job low, thereby paving the way for lower wages. A directive was introduced by the Treaty of Rome whereby equal remuneration for jobs of equal value was to be enforced. Women were put in a position to challenge the neutrality of a job evaluation systems. In terms thereof women could challenge the pay structure by challenging the gender neutrality of the job evaluation study.

The vital elements in conducting an action of this nature are discussed in the South African paradigm with reference to foreign experiences. Although no specific equal pay legislation exists, the Labour Relations Act of 1995, prohibits direct and indirect sex discrimination. This legislation is in line with international criteria and it is submitted that the prohibition includes equal pay for work of

equal value. The defences raised by employers in foreign countries are discussed, although the applicability thereof remains uncertain.

The Green Paper of Employment and Occupational Equity has been published. The Equal Pay issue has been identified as requiring attention. Interviews with NALEDI have indicated that the issues still have to be formalised before negotiations between trade unions, employers and the government are to commence. The international arena has provided a fruitful setting for gender equality, and although the success has been limited, we expect South Africa to draw from the experiences. Legislation in this regard is not expected before the later part of 1998.

There are many academics, feminists and gender equality activists eagerly awaiting the publication of the Employment and Occupational Equity Act. Some points are made which are vital for effective legislation. On the other hand, the ineffectively of legislation in this field has been proved repeatedly in other countries.

AA. Introduction

South Africa is emerging from a political system which not only discriminated on the grounds of race but also on that of sex. The previous regime was especially insensitive to discrimination against women. Black and even white women experienced direct discriminated both inside and outside the marketplace. One prominent aspect of the discrimination was that women were denied equality regarding pay compared to their male counterparts. Married woman with working husbands in the public service, for instance, simply did not qualify for home loans.

No doubt the present government is under pressure to eliminate discrimination in all its forms. This formidable task has been faced head on. We have seen discriminatory acts repealed; however, this is the easy part. Enacting effective legislation is laborious. Equal pay legislation generally forms part of broader anti-discriminatory legislation. In South Africa the Green Paper on Employment and Occupational Equity is currently receiving attention, and we expect that it will specifically provide for pay equality. This paper aims to contextualise the concept of equal pay for woman in its different forms, evaluate South Africa's current legislation and examine the effects of international experiences in this regard.

A. HISTORICAL PERSPECTIVE

Much has been written about the origins and reasons for sex discrimination. None are more blatantly discriminatory than some religious theologies.

Wilson[1] indicates that all major religions - Christianity, Islam, Judaism, Buddhism and Hinduism -have males as their paternal leaders and promote systems of religious symbolism that

[1] Wilson 'Law in Society The Principle of Sexual Equality' (1983) Manitoba Law Journal 221

leaders and promote systems of religious symbolism that peripheralise the role of the woman. In the Judeo-Christian tradition, the Old Testament teaches that woman was made from the rib of man. [2] It suggests that in the eyes of God, women are inferior to men. The woman's role is defined as that of a companion or possession of man who is the central being on earth. Eve is further portrayed as the evil temptress who was responsible for the damnation of mankind to a life of hardship and death.

The teachings of Jesus in the New Testament place women on equal spiritual bases as men but unfortunately, the female role is limited to that of supporting man. It has been said that:

"In the New Testament the apostle Paul put woman in their place: veiled, silent, and subordinate. In the early centuries of Christianity the fathers of the church classified women as fickle, shallow, garrulous, weak and unstable. In the Middle ages, Thomas Aquinias decreed that they are misbegotten males, and theologians dutifully taught this for centuries."[3]

Throughout the Bible the reference to the male God has had profound ramifications which are evident today, for example, it is accepted by many that baby girls wear pink clothes and baby boys blue. It is argued that blue, the colour of the sky is a symbolic reflection of the holiness and the immortality of God, whereas pink symbolises the flesh, the fallible, the mortal and the subservient. The influential role of the Christian church throughout history has made a paramount contribution to female prejudice.

Before the birth of Christ, the Romans had developed a legal system which forced on women domestic, as opposed to commercial, roles. At the head of the family was the *paterfamilias*, the father, who remained such until his death when the male children of the house inherited the title and status of a *paterfamilias* irrespective of their age. The daughters received no family power. Traces are still

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[2] The book of Genesis

[3] Daley *The Spiritual Dimension of Women's Liberation* Routledge (1991) 335-336

apparent today by the assumption of the male surname by the female after wedlock. Women in ancient Roman law had private rights but no public rights. For instance, she could give evidence in court on her own behalf but not on behalf of third parties. Emperor Justiniun (AD 527-65) theoretically equated the sexes in private law but their operation was still based on female 'inferiority.'[4] Women were excluded from public law and the governing of the state.

The Marital Power[5] has its origins in the Germanic social structures. Much of the women's property was under the control of the husband. This position prevailed in South Africa until 1984,[6] The Germanic tribes invaded the eastern part of the Roman Empire before Justinian made amendments to the Roman law. The Germanic custom and Roman Law blended well. Changes did occur but there was to be no equality for women. For example, a woman's dependence on her father or paterfamilias in Roman Law was altered to dependence on her husband in terms of Germanic custom.

The destiny of woman to be regarded as inferior and thereby receive less pay than their male counterparts was set. In the UK, for example, the Statute of Labourers of 1388 set agricultural wages for all women irrespective of the task performed or degree of skill required, whereas men's wages were set higher and varied according to skill. This prevailed until the nineteenth century during the industrial revolution, when the British parliament passed the Mines and Collieries Act in 1842 and the Factory Act in 1844, protecting women from working underground in mines and limiting the hours of work.

After the Second World War women for obvious reasons entered the market place in large numbers. The prevailing legislation in western countries was still of a protective nature. The first equal pay for

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[4] Robinson in Mlean and Burrows *The Legal Relevance of Gender: Some Aspects of Sex Based Discrimination* MacMillian Press (1988) 41

[5] term relating to the authority and rights the husband possessed over his wife, her assets and the common estate.

[6] 1 November 1984

equal work considerations for men and women were formulated by the International Labour Organisation in the 1950's. The 1960's and 70's were characterised by a sharp increase of women liberalisation and women's rights groups. Most western countries thereafter passed specific legislation prohibiting discrimination on the basis of sex. For example, legislation prohibiting discrimination on the basis of sex was included in Title VII of the US Civil Rights Act in 1964.

The affirmation of polygamous unions by many Eastern and African religions has been interpreted as similarly endorsing subservient female status. African culture views a union between a man and woman as a bond between two family groups. The group interest is superior to that of the individuals. The father's brothers are all considered fathers of the child, and because much emphasis is placed on procreation, at the death of the father the brothers are expected to proceed in the place of the deceased. In cases of the mother being infertile, a sister may act as a substitute for reproductive purposes. In sub-Saharan Africa women were traditionally allotted different roles to their male counterparts. Men generally did more strenuous work, for example, men tilled the soil while women were allotted the tasks of weeding and harvesting. However the differentiation is not necessarily made on the basis of the strength required to perform the specific task. As weeding, for instance, is not simply a once off task it is repetitive and normally spans over a period of time. The women's task was not completed at sunset on the fields, as she was responsible for the provision of the household as well. It has been argued that the women's tasks were far more strenuous that those of the men. Despite this, women still played a subservient role.

The influence of industrialisation and consequently urbanisation in South Africa caused males to migrate to the mines to work for cash wages, while the women remained to take care of dependants. Women, in addition to their domestic functions, had to continue with subsistence agriculture and herding with the assistance of older children and the extended family.

While Western countries enacted specific anti-sex discrimination legislation in the 60's and 70's, South African legislation was introduced indirectly by the introduction of the unfair labour practice after the Wiehan commission conducted an investigation into labour relations in 1978. It was not until the revised version of the unfair labour practice was introduced in 1988,[7] that specific reference was made to sex discrimination.

B. WHAT IS SEX DISCRIMINATION

When one describes another's conduct as discriminatory, we acknowledge that his or her conduct is inappropriate or unacceptable. Discrimination takes place when a person fails to distinguish between his / her fellow human beings as individuals, but rather reacts to that person on the basis of the generally assumed characteristics of that group.[8] The implication is that sex discrimination occurs when a person prejudges a woman on the basis of assumed general female characteristics.

No paper examining inequality is complete, irrespective of whether the basis of discrimination is race, colour, religion or arbitrary grounds, unless it contains the basic principles regarding discrimination. Much of the discrimination debate today focuses on race and black empowerment, although some authorities acknowledge that questions arise regarding women, black and white. Much research has been done in South Africa on the topic of race discrimination and it has been said that affirmative action "applies equally both to blacks and women."[9] Budlender[10] disagrees and suggests that this is not always true. There may be similarities but the underlying reasons for gender discrimination are older and deeper.

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[7] The Labour Relations Amendment Act 83 of 1988

[8] Bourn and Whitmore *Discrimination and Pay Equity* 15

[9] Maphai 'Affirmative Action in South Africa-a genuine option Social Dynamics' referred to by Budlender 'Human resource Development and Gender Affirmative action' C.A.S.E 1

[10] Budlender ibid

The existence of racial discrimination in South Africa can be traced back to the apartheid government's policy on segregation. Gender discrimination goes back in history as far as we care to remember. Affirmative action activists see it as a temporary measure to rectify the imbalances of the past, and believe that it should fall away once this is achieved. Budlender[11] concedes that the need for racial affirmative action may fall away but gender discrimination is unlikely to disappear due to many social processes encouraging it.

Discrimination follows the assumption of generalised characteristics of a group or class of people. In *Hurley v Mustoe*[12] the employer acted on the assumption that all married women with children are unreliable. It does not mean that the employer is prohibited from employing unreliable persons, it means that the employer should assess all candidates on all grounds, including their potential reliability. Candidates should not simply be rejected because they fall within a specific group, or possess certain characteristics which are irrelevant to the job, such as, the fact that a women may fall pregnant or that she has small children at home. Unequal remuneration is not unfair in itself and is often legitimate, provided the differentiation in pay is on account of some other factor which does not rest on a generalised assumption about the characteristics of particular groups of people.

The Labour Relations Act[13] prohibits both direct and indirect unfair discrimination. The South African act does not define these terms, thus foreign law has to be consulted. Direct discrimination is defined in the British Sex Discrimination Act:

"*A person discriminates against a women in any circumstances relevant to the purposes of any provision of this Act if*
(a) on the ground of her sex he treats her less favourably than he treats or would treat a man."

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[11] Budlender ibid
[12] (1981) *ICR* 490
[13] Residual Unfair Labour Practice Schedule 7 Act 66 / 1995

And direct discrimination against married people is defined in similar terms, in section 3(1)(a):

"*on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex.*"

Direct discrimination takes place in a comparison between two persons, one person receives less or is treated differently solely for the reason that he/ she is a member of a particular sex.

Indirect discrimination applies to pay disparity as it applies to other forms of discrimination. Indirect discrimination is expressed in the writings of Aristotle: *"like cases should be treated alike, or unlike cases should be treated unlike in proportion to their unlikeness."*

Indirect discrimination takes place when an action or a proposal appears on the face of it gender-neutral. Once the practical effect of this action is scrutinised, however, it becomes clear that it disproportionately favours certain groups of people. The proposed action may be neutral in terms of a male standard but not in terms of female standard. According to Loenen,[14] for example, woman are allowed to compete with men on equal terms in the labour market, but the conditions of the labour market which make the combination of labour and child-care very hard for women, do not necessarily change. Loenen gives another example of an employer who is of the opinion that single parents should not be employed, as they will encounter more conflicting interests between the employer and their family obligations at home. Initially, from a formal equality point of view it presents no sex equality problems as both sexes are treated the same. However from the female point of view this poses a major threat because most single custodian parents happen to be female.

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[14] Loenen 'Rethinking Sex Equality as a Human Right' (1994) *NQHR* 3 258

In *Rinner-Kuhn v FWW Spezial-Gebaudereinigung,*[15] the European Court of Justice was approached to decide whether a German statute excluding part-time employees who worked less than ten hours a week from the right to sick pay was discriminatory. The court indicated that it would be allowed only if the German Government could prove that the measure corresponded to a necessary goal of social policy, and that it was appropriate to achieve that goal. The implication of this case was to test whether legislation and social policy had a corresponding goal.

Once the scope of indirect discrimination is realised, one has to establish what, if any, limits exist. The limits in achieving substantive equality on the one hand lie in its practical implementation, and on the other hand, the fundamental nature of the concept. The first limitation lies in the method of review to be applied. How far will the courts will go to implement these concepts in practice?. Loenen[16] indicates, for example, that the Netherlands courts have been very lenient in their approach, as "*striking down the challenged legislation would cost the state a huge amount of money.*" For that matter, it would have large effects on the private sector resulting in higher costs and less taxes for social services. Loenen is of the opinion that even the European Court of Justice has been more lenient than their strict proportionality approach formulated in the *Bilka*[17] case. In subsequent pay equality cases, for example, the employer used criteria like mobility, training and length of service to establish pay differentials. The court accepted these criteria as legitimate if they are, 'of importance for the performance of specific tasks entrusted to the employee.'[18]

A second limit in applying the concept of indirect discrimination lies in the results to be achieved at the end of the day. There is no guarantee that new legislation would bring about the desired results.

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[15] European Court Reports (1989), 2743, consideration 14
[16] Loenen op cit 265
[17] *Bilka-Kaufhaus Gmbh v Karin Weber Von Hartz* (1986) European Court Of Justice Reports 1607
[18] Loenen op cit 265

Loenen again uses the Netherlands as an example, when new legislation was enacted in the field of social security. The net result was that all categories were in fact reduced to make sure that the alterations to legislation would not influence the existing budget negatively.

Another limitation is that the comparison in equity cases was and will always remain problematic. The courts need a point of reference to remedy indirect discrimination. Loenen suggests, "*Indirect discrimination does not take as conspicuous a form as disadvantaging part-timers and does not on its face differentiate in any sex-linked way.*"

The legislators seem to shy away from laying down concrete references for the courts to work from. It is suggested that ultimately it is a political and financial question combined in the world of politics. It seems, for example, quite simplistic to list the factors in legislation to be considered in rating jobs and to put an inspectorate into place with effective muscle to enforce gender equality. Some countries have done this, but the courts are again left with large powers and discretion.

THEORIES REGARDING SEX DISCRIMINATION

One popular theory of gender discrimination suggests that women are handicapped by lack of physical strength, ie biological differences. Physical strength played a large role in traditional jobs, such as manual work in the agricultural sector. Wages in Mao's China quotes a scale that gave women seven tenths of the male rate, justified on the grounds that the women's output was lower than that of the men.[19] It is argued that although there are clear physiological differences between the sexes, these differences have been exaggerated by social processes which create new differences where no natural ones exists.[20] The research paper[21] to the Commonwealth

[19] Davies and Freedland *Kahn Freund's Labour and the Law* 389

[20] Feys 'Draft Equal Employment Opportunities Policy as Regards Gender For Commonwealth' Countries research paper presented to the Commonwealth Secretariat, August 1996 by Institute of Development and Labour Law, University of Cape Town, SA

indicates that there is no scientific bases for supposing that women are inherently less productive than men. The difficulty of this generalisation is how strength is measured. It has been argued that women's strength may lie in greater stamina than men.

The argument that women's output is less than that of men fails, as often the tasks performed by women are not considered as output. These include the domestic functions such as giving birth, cooking, cleaning, raising children, etc., which tend to be disregarded, as the work is unpaid. Clearly these functions require as much effort, skill and energy as other tasks performed by the male. Modern medicine indicates clearly that the female body is exerted to near fatal limits throughout pregnancy and childbirth. Yet the female bears the status of an under- producer or achiever. Any multi-faceted approach to the strength test, surely cannot portray women as weaker.

White collar occupations require training and experience rather than physical strength. Women are again at a disadvantage as a large portion of women leave the employment environment to raise a family, and this in turn leads to reluctance on the part of the employer to engage in equal pay policies. Some employers believe that they will receive a lower return with women than with men on their training investment. These women will have gained less experience, and therefore also have a disadvantage with regard to promotion opportunities .

Sir Henry Phelps Brown[22] examines how gender discrimination occurs in the labour market. He suggests as a explanation for women's lower pay that employers are unable to estimate the value of the women's work, and therefore, they attach conventional valuation to women's work. He is of the opinion that women do not push, singly or in combination to raise the value of their work. The employer is then left to apply conventional valuation to women's work, ie. women's

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[21] Draft Equal Employment Opportunities Policy op cit 4
[22] Brown *The Inequality of Pay* (1978) 155

'status, station in life and the minimal expenditure required to maintain that station.' Brown suggests that a status differentiation exists between men and women, and that the conventional valuation of women based on the 'lower' status of women would thus be applied in practice as a discount on what is paid to men doing similar work.

Women tend to perform a disproportionate amount of jobs such as teaching and nursing, which are seen as extensions of domestic functions and are therefore poorly remunerated.[23] NALEDI[24] notes that more than nine out of every ten nurses, physiotherapists, dieticians and domestic workers are women.

It has been submitted that the main reason for disparity in earnings is that boundaries have been redefined in such a manner that new patterns of occupational segregation effectively keep men apart from women in the workplace.[25]

Brown[26] concludes that the problem with discrimination in the market place is slight compared with that of discrimination outside of it.

D. SEX DISCRIMINATION IN SOUTH AFRICA

Unequal wages based on sex have been prohibited from the early eighties in South Africa. The effectiveness of this measure is tainted by the discriminatory policies of the past government. Black people, for example, in the public service were forced into specific jobs, normally manual work, by means of denying them certain positions, irrespective of education and skill. In a 1989, an interview with a personnel officer in the employment of the government in Port Elizabeth, explained that when black people with the required

[23] Louw 'Sex Discrimination in Employment' Doctoral thesis UNISA 1992
[24] National Labour & Economic Development Institute Research Report 'Equal Pay For Equal Work' 1995 7
[25] Tienda & Ortiz, o.c. note 69, 49 referred to by the Equal Opportunities Research Paper to Commonwealth 1996
[26] Brown op cit 158

qualifications applied for a job that had been advertised, their applications would be "thrown into the wastepaper basket" and the post would be left vacant rather than appointing a black person. The reason she gave was that it had been an order from the top management. The result was that the pay equality instruments did not apply to the public service which was one of the largest employers in South Africa. In these circumstances it would be difficult to grade the effectiveness of earlier legislation.

A NUMSA survey[27] of 92 factories in the auto industry in 1988, suggested that in cases where more than half the workforce were women, the average minimum wage was R91-35 and in the case of men being the majority, the average minimum wage was R134-44. In the case of there being no woman in that specific category the average minimum wage was R136-35.

Although Pillay's[28] analysis was published in 1996, he draws from a 1987 survey of more than 1200 employees in the manufacturing sector of the four major metropolitan sectors, namely Cape Town, Durban, Johannesburg and Port Elizabeth. His survey was aimed at the relationship between education and earnings regarding race and gender.[29] He indicates that in virtually all occupations, substantial earnings are differentiated by sex. His statistics suggest substantial sex discrimination against black females, indicating that females on average in the specific categories receive mean earnings of approximately 73 per cent of male earnings. Discriminatory practices also exist in lower occupations, ie. unskilled and higher non-manual occupations, and Pillay draws the conclusion that there is no clear pattern discernible. The following table by Pillay indicates mean earnings by sex in specific occupations.

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[27] NUMSA 'Woman Organise' Johannesburg 1988

[28] Pillay Project Co-ordinator SALDRU / World Bank Projects for Statistics

[29] Pillay 'The Determinants of Earnings and Occupational Attainment in The South African Labour Market (1993) 1'

The table D.1 indicates that on a managerial level there seems to be the smallest wage gap, and women receiving 90 per cent of male earnings. The table suggests that the largest wage gap exists on the professional level. The average wage gap in this particular study is 78,2 per cent. The results of a similar study at a point later in time would be interesting to gage the effectiveness of campaigns and legislation after the democratic elections. The results of gender affirmative action in a new democratic environment then be monitored.

D.1. MEAN EARNINGS BY SEX - SPECIFIC OCCUPATIONS

OCCUPATION	MEAN EARNINGS		(R PER MONTH) As % of
			Male
	MALE	FEMALE	
UNSKILLED MANUAL	539	418	78
SEMI SKILLED MANUAL	725	538	74
CLERICAL	1373	1227	89
MANAGERIAL	2882	2600	90
PROFESSIONAL	3370	2026	60

P-E Corporate Services conducted a study in 1993, reflected in the National Labour & Economic Development Institute report,[30] indicating that larger companies normally have a formal policy of equal pay for equal work. However, the statistics suggest that in the larger companies a female grade 1 operative receives a median pay of R1143 a month as opposed to male employees in the same grade receiving R1211-58. This indicates that woman receive 6 per cent less than men.

The comparison between NALEDI and Pillay's research of the semi-skilled wage gap between men and women in 1987, shows the wage gap has narrowed from 74% to 94%. We assume that a grade 1 operative is classified as semi-skilled labour. This indicates that gender discrimination has decreased. These statistics should, however, be viewed with caution for the following reasons: firstly, as mentioned elsewhere, discrimination in most of its forms has been the basis of the relatively violence free revolution that led to the change of government, and there had been much pressure on employers to address all forms of discrimination even before the national elections. By this I mean that in the period since 1989, discrimination has been dealt a hard blow in the form of political change. This does not mean that the war against gender discrimination will continue at such a fierce pace as race discrimination and that the momentum will continue at this pace.

Secondly, the writer has not scrutinised the basis of the surveys or participated in the conducting or evaluation of the information gathered. Thirdly, the field of semi-skilled labour could be misleading as it refers to large fields of different occupations and in its nature is the bridge between the unskilled and skilled occupations. These statistics should be seen for what they represent and no more. At most these figures should indicate that within a small section of the labour field there seems to be an improvement in the wage gap between men and women.

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[30] NADLEDI 'Equal Pay for Equal Work Issues and Options' NALEDI publication (1995)

Pillay's survey pursues the question of how education effects the whole equation.

In the table below, it is clear that in the less educated, or in the sector of employment where no formal education is required, the wage gap between male and female is at its largest.

D.2. THE IMPACT OF EDUCATION ON PAY DISCRIMINATION

LEVEL OF EDUCATION	GROUP	MEAN EARNINGS (R PER MONTH)	FEMALE EARNINGS AS % OF MALE
NIL	AM	584	
	AF	400	68
PRIMARY			
	AM	648	
LOWER SECONDARY	AM	680	
	AF	492	72
	WM	1757	
	WF	1211	69
	CM	776	
	CF	496	64
HIGHER SECONDARY	AM	721	
	AF	538	75
	WM	2275	
	WF	1587	70
	CM	915	
	CF	668	73

NOTES Group codes: A - African, F - Female, M - Male, C - Coloured, B - Black, W - White

Pillay observed that lower earnings for females compared to males in a specific category cannot be explained by the difference in standard in education. He indicated that females, on average, had higher levels of schooling that males, ie 9.8 years of schooling for females as opposed to 9.4 years of schooling for males. Pillay further observes that lower female earnings could be due to less experience and relative lack of access to the higher-paying occupations. Pillay concludes is that the reasons for the existence of wage disparity between male and female are not levels of education, rather they are the result of a range of reasons, including discriminatory practices. Pillay believes that women are 'crowded' into certain occupations:

"*because of the distaste of the employers for female employees...In other words tastes and preferences account for much of the discrimination against women.*"[31]

Pillay's[32] survey data indicates that although sex discrimination has been prohibited since the early 1980's, the distribution of labour is such that women are concentrated in lower paying occupations. Ninety-one per cent of women opposed to 73 percent of men were in the unskilled, semi-skilled, and lower non manual occupations.

Although it is difficult to gage the effectiveness of legislation, pressure groups, public campaigning and education to enforce gender equality in the workplace, it has become clear that gender discrimination is alive and well in South Africa and that it needs to be addressed.

[31] Pillay op cit 23 24
[32] Pillay op cit 26

The table D.3. below, draws from the CSS, October Household Survey 1994 indicating an analysis of incomes by race and gender for selected occupations in South Africa.

The survey made an analysis of jobs, including elementary workers, top management, clerks, artisans, operators and assemblers. This illustrates that only 12 per cent of the black female work force and 11 per cent coloured female work force, have an income in excess of R2000-00 per month compared to 47 per cent for white males and 43 per cent for white females. There were court decisions regarding race discrimination in the past. These earlier decisions have suggested differentiations in the workplace that are based on grounds other than skills and education that would constitute an unfair labour practice.

D.3. ANALYSIS OF PAY BY RACE AND GENDER

				Of which is included under black population							
TOTAL EMPLOYEES		BW %	BM %	AW %	AM %	CW %	CM %	AW* %	AM *%	W F %	WM %
	R0-499	26	27	7	3	20	19	30	30	4	2
	R500-999	27	25	24	14	28	24	27	26	2	7
	R1000-1999	35	33	49	40	41	37	32	32	38	2
	over R2000	12	14	21	29	11	15	12	12	43	47
% OF EMPLOYMENT GROUP		70	93	93	87	87	95	65	93	90	80

Note BW-Black Women, BM-Black Male, AW-Asian Woman, AM-Asian Male, CW-Coloured Woman, CM-Coloured Male, AF*-African Female, AM* African Male, WF-White Female, WM-White Male.

Fifteen years after the introduction of the unfair labour practice in South African labour law, the courts were faced with a gender discrimination issue. In *Association of Professional Teachers & Another v Minister of Education & Others*,[33] Landman P and Basson AM handed down what has been described as a landmark decision. The applicant was a married school principal, who in terms of the Public Service code, was denied subsidised housing. This benefit had been available to male and certain female teachers, however, married female teachers qualified for the housing benefit only in cases where their husbands were medically unfit. After certain technical defences on behalf of the minister of labour were dealt with, the Industrial Court was faced with the question regarding the extent of its jurisdiction in the interpretation of the interim constitution. The court expressed its acceptance that the constitution confers no constitutional jurisdiction on the industrial court. The court however took special note of section 35 (3) requiring courts to have due regard to the spirit, purpose, and objects of the chapter on fundamental rights. The court had found a way to address the constitutional law question of gender discrimination in the workplace. The court stated that not all cases of differentiation would constitute gender discrimination. If the reasons for the disparity are reasonably justifiable, and objective, it would not constitute discrimination. If the reason for the disparity is unjustified and arbitrary, based on an "immutable personal characteristic such as sex or race," it would constitute unfair and prohibited discrimination.

The court found that the disparity the applicant experienced was in fact unfair discrimination. The court inquired whether this discrimination served a legitimate or social purpose, but could find none. The court found the employers intent was irrelevant. The

[33] Employment Law 'Womandla Gender Discrimination' 1996 12 3

Education Labour Relations Act[34] limited the court's jurisdiction regarding relief. The court was unable to make an order prevailing over a provision in a statute. Instead the court made a declarator, laying down guidelines and affording the parties an opportunity to resolve the matter.

The judgement has been viewed as the first step in the quest to remove sex discrimination in South Africa. Employers have a clear indicator as to the view taken by the courts regarding sex discrimination.

E. INTERNATIONAL PERSPECTIVE AND INSTRUMENTS

Workplace discrimination is generally prohibited by the International Labour Organisation's convention 111 of 1958. It is a broad prohibition of discrimination and specifically defines it as:

"any distinction, exclusion or preference made on the basis of race, colour, sex,... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."

Campanella[35] indicates that the latter part of the definition is of particular value, as it prohibits certain effects or results which are brought about by the distinction, exclusion or preference of an employee on one or more of the above mentioned grounds.

The ILO' s equal remuneration convention No 100 of 1951 states:

"Each member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, insofar as it is consistent with such methods, ensure the application to all workers of the principles of equal remuneration for men and women workers for work of ***equal value.***"

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[34] Act 146 / 1993

[35] Campanella 'Equal Pay -The Price of Equality' *Labour Law News and Court Reports* (1993) 4 5 3

This definition, although SA has not ratified either of the two conventions, warrants closer attention. The definition of remuneration[36] is very broad, extending over and above monetary remuneration. Convention No 100 provides for a ground of comparison of remuneration, ie. equal value. The ILO further provides guidelines regarding the interpretation of equal value. Clearly it does not simply denote identical or perhaps similar work. We shall return to this below.[37]

Most industrialised countries have laws outlawing discrimination on the grounds of race, gender or sex. Some countries have elected to put equal pay laws in separate statutes although it forms part of the broader discrimination concept. We shall deal with some of these international experiences.

E.1. The European Community

The European Community has prohibited pay discrimination remuneration between men and women in article 119 of the Treaty of Rome 1957. By and large it is an adapted version of ILO convention 100. Article 119 provides as follows:

"*Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this article, pay means the ordinary or basic or minimum wage or salary and any other consideration whether in cash or in kind which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without discrimination based on sex means:*
(a) that pay for the same work at piece rates shall be calculated on the same unit of measurement;
(b) that pay for the same work at time rates shall be the same for the same job."

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[36] The ILO defined remuneration as '*the ordinary or basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker arising out of the workers employment.*'

[37] See comparisons

It is noteworthy that the definition has a broad interpretation of 'wage' and refers to equal pay for equal work. The definition of pay is similar to the ILO definition and includes the wage or salary and any other consideration, whether directly or indirectly cash or in kind. The question arose whether it was the intent of the drafters of article 119 to equate equal pay for equal work with equal pay for work of equal value. The ILO convention 100 indicates equal pay for work of equal value. It was argued that the EC, by the differentiation of words, intended 'equal work' to be equated to 'like or similar work.' The foreign language texts of article 119 suggests a narrower interpretation. The French text of the treaty, for example, which uses the terminology '*meme travail.*' It was not until 1975 when a directive to member states regarding article 119 reminded them of their obligations in terms of the treaty.

Article 1 of the Equal Pay Directive 75 / 117 of 1975, provides for the following:

The principle of equal pay for men and women outlined in article 119 of the Treaty, herein after called the principle of equal pay , means for the same work or for work to which ***equal value*** *is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification system is used for determining pay, it must be on the same criteria for men and women and so drawn up as to exclude any discrimination on grounds of sex.*

In *Jenkins v Kingsgate Ltd* [38] argued that the concepts, equality for equal work or equal pay for work of equal value are very different in content. It was argued that the Equal Pay Directive is *ultra vires* of article 119 of the treaty. The European Court of Justice, however, declared that Article 1 of the directive declares nothing that cannot be read into Article 119 of the treaty.

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[38] (1982) *ICR* 592 (ECJ)

The sex based anti-pay discrimination legislation is not limited to a comparison of equal work or similar work but extends to include work of equal value. On one side of the spectrum one compares jobs on the basis of equal work, and on the other, on the basis of work of equal value. Similarly work is located somewhere in between. The content of these grounds of comparison are dealt with below in the discussion of the anti- discriminatory laws of the United Kingdom.

E.2. United States

The concept of equal pay for 'comparable worth', or equal value, is known in the United States is contained in the Equal Pay Act of 1963 and in Title Vll of the Civil Rights Act of 1964. The Civil Rights Act prohibits discrimination on the grounds of race, religion, natural origin, or sex. The applicant will be successful with a claim based on pay discrimination if a difference in the relative pay exists between male and female co-workers, and the disparity cannot be justified by corresponding differences in 'worth' of the job. The jobs being compared do not have to be equal but 'substantially equal' to be valid. *County of Washington v Gunte,r*[39] in interpreting the Equal Pay Act, rejected comparative worth in favour of 'substantially equal' work. Louw[40] suggests that the courts are hesitant to become involved in the evaluation of work of equal value.

County of Washington v Gunter addressed the question of whether it was necessary for the applicant to show that a member of the opposite sex, holding the same position under the same employer, is receiving higher remuneration.[41] In a 5 to 4 decision, the question was decided in the affirmative. The applicants were four female prison guards who alleged that they were paid less than male prison guards for substantially equal work, and that the discrepancies were due to intentional sex discrimination. According to the district court's

[39] (1981) 452 *US* 161

[40] Louw op cit 317

[41] July A Saltoun 'County of Washington v Gunter: Sex Based Wage Discrimination Extends beyond the Equal Pay Act' *Loyola of Los Angeles Law Review* (1983)16 151

interpretation of the Equal Pay Act, the applicants had to prove 'equal work.'[42] The court found that the applicants did not conduct work substantially equal to the jobs performed by the male guard compactors. An appeal to the Ninth Circuit Court of Appeals was dismissed, which affirmed the district court decision that female and male prison guards were substantially unequal. The matter was referred to the Appellate Court which indicated that Title VII of the Civil Rights Act had a broader remedial effect, and the absence of proving 'equal work' as required by the Equal Pay Act did not preclude the applicant from instituting an action under Title VII.

The comparable worth doctrine,or pay of equal value, was addressed. The theory essentially suggests that a women in a traditionally female job, should receive equal remuneration to a traditionally male job if the job requires comparable skill, effort, and responsibility. The Gunther decision did not endorse the comparable worth theory.

Du Toit et al [43] states that the court held that unequal pay for work of equal value (comparable worth) is a form of discrimination prohibited by the Civil Rights Act of 1964. The Equal Pay Act is of limited application as it is limited to comparing cases of 'substantially equal work', but the Civil Rights Act addresses comparison of work of equal value or comparative worth.

E.3 The United Kingdom

The United Kingdom's treatment of pay discrimination is of particular importance as historically its legal system and that of South Africa have much in common. In the UK discrimination is outlawed in three statutes, The Sex Discrimination Act, the Race Relations Act and the Equal Pay Act. Both the Sex Discrimination[44] and the Race Relations Acts deals with and define discrimination similarly to the

[42] Gunter v County of Washington (BNA) 20 Fair. Empl. Prac. Cas 788,791 (Or. 1976)
[43] Du Toit et al *The Labour Relations Act of 1995* (1996) 397, fn 250
[44] The Sex Discrimination Act defines direct discrimination as *'A person discriminates against a woman in any circumstances if... on the grounds of her sex he treats her less favourable than he treats or would treat a man.'*

International Labour Organisation's convention 111 and the South African Constitution. Both outlaw direct and indirect discrimination.

The UK Equal Pay Act 1975 has a threefold approach,(with a fourth, added after an amendment in 1983).[45] Firstly, the act assumes implicitly the existence of an equality clause in the contract of employment, which may alter the terms and conditions of the contract, in order to eliminate inequalities between men and women in the same employment.[46]

Secondly, a similar equality clause is assumed or implicitly read into a contract of employment overriding any discrimination in pay between men and women in the same employment on work rated as equivalent.[47] The application of a gender-neutral job evaluation system to different jobs establishes whether jobs are comparable for purposes of pay equality. The job evaluation system should not set different criteria for men and women.

Thirdly, the act provides for the scrapping of provisions contained in collective agreements and formal pay structures which apply specifically to men only or to women only.[48] The act directs that the Central Arbitration Committee should assist with the amendments to these discriminatory provisions contained in collective agreements.[49]

An amendment[50] to the Equal Pay in 1983 resulted from of the European Court of Justice's ruling that the UK legislation fell short of the European Community requirements,[51] by not prohibiting equal pay for work of equal value. The EEC Council (as it was then known)

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[45] Regulation 2(1) of the Equal Pay Amendment Regulations 1983
[46] Section 1 (2) (a) of the Equal Pay Act 1970
[47] Equal Pay Act 1970 section 1 (2) (b)
[48] section 3 Equal Pay Act 1970
[49] section 3 (1) Equal Pay Act 1970
[50] Collin Bourn John Witmore *Discrimination and Equal Pay* (1989) Sweet & Maxwell 10
[51] *Defrenne v Sabena* 43/75 (1976) E.C.R. 455 which held that article 119 of the Treaty of Rome which provide for equal pay for equal work, was directly applicable to members states. The E. C. Commission successfully took steps against the U.K. Government. The 1982 amendments to the Equal Pay Act resulted.

issued a directive[52] instructing member states to comply with article 119 of the Treaty of Rome. In *EEC Commission v United Kingdom Government,*[53] the UK government relied on the defence that work rated equivalent[54] as a ground of comparison constituted sufficient compliance with Britain's obligation as a member state of the European Community and signatory to the Treaty of Rome article 119.

The significance of the amendment is the inclusion of another basis of comparison, to the existing list of equalisation instruments, ie. equal pay for the same or similar work and work ranked equal. In other words, one of the important effects of the 1983 amendments is that the severe limitation of the Act, which confined applications to 'like or similar work,'[55] is expanded to include work of equal 'value.' [56]

Once the grounds of comparison are established, on which wage equality shall be gauged, one is confronted with questions regarding the meaning of these concepts.

E.3.(a) Like work as a ground of comparison in terms of the Equal Pay Act.

The Act limits[57] 'like work' comparisons to employees in the same employment. Employment is defined by the Act in such a manner that the comparison is restricted to a single common employer or a associated employer, and specifically to employees at the same establishment or another establishment where common terms and conditions are observed. The act does not aim to promote inter-employer comparisons.

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[52] Directive 75/ 117 of 1975
[53] case 61/81 (1982) *ICR* 578
[54] sections 1(2) (b) & (5)
[55] *Capper Pass LTD v Lawton* (1977) *ICR* 83
[56] Du Toit et al op cit (1996) 397-8
[57] Equal Pay Act 1970 section 1(2)

The act section 1 (4) defines like work as follows:

"A woman is to be regarded as being employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences, if any, between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment: and accordingly in comparing her work with theirs regard shall be to the frequency or otherwise with which any such differences occur in practice and in the nature and extent of the differences."[58]

The wording of the Act and case law support the notion that the application of the concept involves a process of comparing terms and conditions of employment, job descriptions and the practical content of the jobs in establishing whether they are like or similar jobs.

In *Dugdale v Craft Foods Ltd*[59] the appellants who were employed in the quality control department compared their jobs to male quality control inspectors. Six male quality controllers, worked the night shift once every three weeks following a three-shift system. The male quality controllers received 5.80 pounds per morning or evening shift and 11.60 pounds in addition to their basic wage of 42.45 pounds. The female quality control inspectors were employed on a two shift system and unlike the male quality controllers were placed into grades from 1-3. Their wage would differ according to grade. For example, the grade 2 quality controllers received 30.80 pounds per shift after one year. Their shift allowance was similar, 5.80 pounds per shift. The night shift male quality controllers, in addition, their task was to draw off samples for laboratory analysis tests. The females on the other hand were not allowed to work on the night shift. The result was that the male quality control inspectors received 9.65 pounds more than the female quality controllers. Night shift was compulsory for the males, but Sunday morning shifts were optional although they were normally worked by the male controllers.

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[58] Equal Pay Act 1970 section 1 (4)
[59] (1977) *ICR* 48 (EAT)

The question for the court to consider was whether the equality clause could be deemed to be included in the women's contract of employment on the basis of equal pay for like work. The court had the following to say regarding the difference of day and night shifts:

"...the fact that the female applicants do not, and as things stand, cannot do night work represents a substantial dissimilarity between their respective work and that of the male quality control inspectors whom they put forward as doing broadly similar work...This night working every third week is, in our view a substantial element of difference which is of practical importance and which negates any argument that the work of the female and the male quality control inspectors is broadly similar...We therefore find against the applicant..." [60]

The decision was met with mixed response. Davies[61] indicates that the necessary question to be interpreted by the court in terms of the Equal Pay Act is whether the fact of working at a different time, falls within the words, 'the things she does and the things they do.' Does the time that work is performed constitute a difference between the things she does and the things they do? The authors seem to suggest that the time of performance does not invalidate the comparison on grounds of like work. In *Johnson v Nottingham Combined Police Authority* [62] the court, in interpreting sec 1(4) of the Equal Pay Act, stated that they shall pay no attention to the fact that the men work at a different time of the day, if it is the only difference between what the woman do and they do. It must be kept in mind that men will be compensated in addition to their basic wage to work an evening shift, but there seems to be no reason why women should not have an equal basic wage on day shift rate. It is clear from the discussion that the interpretation of like work is interpreted narrowly by the courts. Davis[63] correctly indicates that it is "very much at the one end of the spectrum" in the approach to pay equity.

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[60] *Dugdale v Craft Foods Ltd* (1977) *ICR* 48 (EAT) p 13, 14
[61] Davies and Freedland op cit 375
[62] (1974) *ICR* 170
[63] Davies and Freedland op cit 377

E.3 (b) Work rated as equivalent as a ground of comparison in terms of the Equal Pay Act.

Due to the narrow interpretation of 'like work' it clearly does not go a long way to meet the demand for equal pay and it became necessary to recognise a wider approach to effect pay equality. The British legislator enacted section 1(5) of the Equal Pay Act 1970:

A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value, in terms of the demand, made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluate in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.

At first glance, the definition shows the promotion of voluntarism regarding the standard of rating, and only once the job evaluation system has been completed and given a equal rating, equal pay has to be observed by the employer. The question regarding which job evaluation study is to be applied in any business is ultimately a topic of collective bargaining. It should be noted that if the job evaluation system is not gender neutral it would be open to attack whether it had been the result of collective bargaining or not. Thus the job evaluation study itself may be a vehicle of discrimination if it is not gender neutral. This would occur if the study, for instance, attaches a disproportionately high value to a job characteristic generally performed by men, ie. physical strength or even decision making, which mainly favour men in tradition jobs.

The courts in *Eaton Ltd v Nuttall*[64] and *Greene v Broxtowe District Council*[65] indicated that section 1(5) would only apply to workplaces that have implemented a gender-neutral job evaluation study, based

[64] (1977) *ICR* 272
[65] (1977) *ICR* 241

on a thorough analysis and 'capable of impartial application.' It soon became apparent that once employees embarked on action to challenge the validity of the job evaluation system, the Industrial Tribunal could accept the challenges 'only at the price of in effect engaging in its own job evaluation exercise, which the E.A.T was not willing to require or contemplate.'[66] The result is that employees who felt aggrieved had to revert to "like work' as a basis of comparison and the question of the validity of a job evaluation system was left unanswered. In *Arnold v Beecham Group*[67] the court expressed its reservation as to the extent of a right of an individual to challenge a job evaluation system.

E.3 (c) Equal pay for work of equal value as a ground of comparison in terms of the Equal Pay Amendment Regulations 1983.

As indicated above, the amendment regulation of 1983 was a direct result of enforcement proceedings brought against the British government by the European Community Commission. The result was a ruling by the European Court of Justice obligating the British Government to enact pay equality on the grounds of equal pay for work of equal value. In terms of Regulation 2(1) of the Equal Pay Amendment Regulations 1983,

When a women is employed on work which ...is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man ,in the same employment,

(i) if (apart from the equity clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed ,that term of the women's contract shall be treated as so modified not to be less favourable, and

(ii) if (apart from the equity clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the

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[66] Davies and Freedland op cit 378
[67] (1982) *ICR* 753 G

contract under which he is employed, the woman's contract shall be treated as including such a term.

The question arises how the British courts and authors have interpreted this equalisation innovation. The amendment deals with a fair amount of procedural aspects. The amendment dictates that the Industrial Tribunal must request and receive a report by a panel of experts. The report investigates the particular jobs and job evaluation systems and will indicate whether the jobs compared are of equal value. This report is a prerequisite unless the Industrial Tribunal is satisfied that no reasonable grounds exist to support a finding of equal value, in which case the tribunal is able to dismiss the case. The importance is to illustrate that the Industrial Tribunal could take a narrow view of work of equal value and have the case dismissed before the merits are subjected to the panel of experts.

We assume that the Industrial Tribunal has not dismissed the claim and has referred the matter to a independent panel of experts. What are the nature, content and limitations of the concept, work of equal value. Firstly, the meaning of the word 'equal' is crucial and requires attention. Davies suggests that the word equal indicates:

"the same pay for work of the same value. This they have done by using as we have seen, the mechanism of the equalisation clause to implement the equal value principle, just as it was used to implement the principles of equal pay for like work or work rated equivalent. '[68]

McCrudden,[69] on the parity of 'value' suggests four possible methods of establishing work of equal value: the measurement of market value, the measurement of marginal productivity, formal job evaluation study methods, and by informal evaluation of job content on a points scale.

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[68] Davies and Freedland op cit 386

[69] The New Regulations (1983) 12 *ILJ* 197 201

Davies and Freedland disagree with McCrudden and express their option as follows:

"So the equal value claim is confined to the case where the claimant can find an exact target comparator and demand the same treatment as the comparator. It is not as implicated in this legislation, a claim to comparable pay for any work of comparable value. It does not entitle the complainant to invoke directly the question of what the notional or hypothetical person of the opposite sex doing the same work would have been paid for doing it."[70]

The act provides the respondent with a possible statutory defence, rendering the operation of the equality clause inoperative in the case of the employer proving that the variation in pay or contractual terms was genuinely due to a material difference, between the two cases in question.[71] Material difference being, other than the difference of sex. This defence is dealt with below.[72]

E.4 Ontario-Canada

The period 1985 to 1988 gave rise to proactive sex equality legislation in five Canadian provincial jurisdictions. These provinces were Manitoba, Ontario, Nova Scotia, Prince Edward Island and New Brunswick. I refer to the Ontario legislation primarily as it had been stated in the New York times as having 'gone the furthest in the world.'[73] Other legislation[74] in Canada at the time covered only part of the public sector and excluded the private sector, the reasoning being that the private sector would voluntarily follow suit. The legislators in Ontario correctly disagreed and accepted that the private sector would have to be obliged by statute to irradiate sex based wage discrimination. The private sector was compelled to attain equality objectives within a proposed time frame. A point of criticism is that

[70] Davies and Freedland op cit 387
[71] Section 1(3) The Equal Pay Act 1970
[72] See defences
[73] Judy Fudge and Patricia McDermott *A Feminist Assessment of Pay Equity*, University of Toronto Press (1991) 23 quoting the New York Times of 27 July 1989
[74] New Brunswick equal pay legislation

although this act was seen to be the most progressive in the world it, limited its application to workplaces employing ten or more persons. Therefore thousands of micro businesses were not compelled to exercise pay equality. The argument for the exclusion was that it would hamstring small businesses. It is submitted that these micro enterprises should have been included, but with certain concessions regarding time frames for implementation. The act is generous in its definition of an employer, with the result that in the case of multiple workplaces all having less than 10 employees, but collectively exceeding 10, the employer would be obligated to comply with the Act. Feminist groups have demanded that the 10 employee limit be lifted, as the small private enterprises, with typically low unionisation, are most in need of pay equity.

In terms of the Ontario Equal Pay legislation,[75] the workplace is divided into 'job classes,' as in the other provinces in Canada. All jobs are categorised into classes, the criteria being similar qualifications, duties, responsibilities, and pay schedules. Job classes by definition contain employees doing the same job or jobs of a relatively similar nature. If the individual job evaluation varies greatly within one job class, the employee with an evaluation higher than the average will benefit less from a adjustment.

The function of a job class is to serve as a basis of identification and comparison. Once the job class has been established, the statute imposes a 'gender prominence requirement.' The job class would be either male or female dominant. In order to establish sex dominance, the job class is required to have either 70% male or 60% female employees. Once its is established that a job class is female dominant it has the potential to be entitled to a wage adjustment. A 'male job class' may potentially serve as a comparison in the pay equity scheme. Once the job classes have been established, a job evaluation system is applied to each group. The act requires that each job is to be evaluated, and an average value be allotted to each job class.

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[75] Pay Equity Act 1987

The Ontario Act requires a job classification system while the other provinces in Canada require a job evaluation system. Unions tend to favour a job classification system as it indicates within each particular job an escalating degree of skill requirement, for example, a computer technician with a skill requirement from 1 to 5. This escalated skill factor is not necessarily included in the job evaluation schemes.

Ontario's Pay Equity Act's approach to pay inequality differs from other jurisdictions as it does not apply the complex, 'job to job comparative scheme usually practised in North America.' The former simply establishes an average pay line. If an employee's job rating falls below that average, the job class receives a permanent wage increase. In the latter, the female job class must seek a male job class as a comparator and both should have corresponding job class value ratings or points. Once the female and male job class are compared and their ratings are deemed the same or similar each employee's wage in the female job class is adjusted accordingly. The Ontario Act states that in the case of two male comparable job classes having equal value points, the female job class wage is to be adjusted to the 'lowest possible male comparable'. McDermott's criticism is well founded: " This is truly an amazingly low level of pay equity and clearly indicates the Ontario Government's lack of serious intention to close the wage gap."[76]

The Ontario Equal Pay Act was met with strong opposition from male business associations. It was argued that the implementation of pay equity would cost them billions of dollars and that some businesses would be unable to afford it. They argued that it would have a negative effect on the economy, as it would increase costs of production. The male business associations argued that pay equity costs should be limited to 1% of the previous year's payroll combined with a gradual phasing in of the system in a period of about 4 years.

[76] Fudge and McDermott op cit 30

The labour feminist alliance denounced these proposals and argued that a minimum of 1% and a maximum of 3% should be imposed. After much debate Bill 154 was passed, but indicated that pay equity would cost a maximum of 1% but no more. It seems that the male business associations suggestions were eventually followed. The time period for phasing in pay equity was settled by setting a time limit for the public sector,[77] and devising progressive approach in the private sector, depending on the size of the enterprise and the number of workers.

The Ontario Equal Pay Act is unique in its provision of a dispute resolution mechanism. In the case of a dispute between the trade unions and an employer regarding aspects of the implementation of pay equity, the parties may request the Pay Equity Commission to appoint a review officer who will conciliate the dispute. If the parties are unable to resolve the dispute, the review officer is able to make a binding order. The parties may also follow a different route by referring the matter to the Pay Equity Hearings Tribunal, a quasi-judicial body, for final resolution.

The majority of matters heard by the review officers have been in the health sector. The Ontario Nurses Association represents a large amount of nurses and health workers. The nature of the union members' work dictates that members are prohibited by law to strike, and therefore there is no need for a strike fund. The Trade union's efforts are focused on equal pay adjudication as a gender neutral job classification system would generally favour members as they are highly skilled, work long hours, work in stressful conditions, and have a great deal of responsibility. These factors should lead to wage increases. It is clear that most equal pay matters have revolved around the issue of a true neutral gender-based job classification system, which in turn rates the job class.

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[77] 5 years

Although it has been said that the Ontario Equal Pay Act is an "important step forward to true pay equity, a wage setting system in which wages are pegged to unbiased sex-neutral evaluated points, with some flexibility to respond to market forces, but with controls to keep inequalities creeping back over time,"[78] it is not without criticism. The tribunal has refused to allow the consulting firms responsible for the specific job comparison system intervention status,[79] and has declined to lay down specific guidelines regarding-gender neutral job comparison systems. Judy Fudge comments:

" The Ontario Equal Pay Act embodies a central paradox: although it is designed to redress systemic gender discrimination in compensation for work performed by employees in female job classes, it does so on a basis of a gender neutral job comparison systems in an individual employers establishment. Consequently while the problem of gender wage discrimination is identified as systemic, the remedy replicates the individualised and atomised ordering of the private market system for determining compensation. Sex based sex wage discrimination must be neutralised, but not it seems, at the expense of the autonomy of individual employers to establish compensation schemes that reflect their own priorities. That is why the government did not impose standards for gender neutral job comparison systems, but rather put in place an adjudicative mechanism for resolving disputes."[80]

The Ontario Equal Pay Act certainly has been at the forefront of closing the gap on sex-based wage discrimination, save for the flaws referred to above. It has become apparent that litigation is reserved for the privileged or well funded organisations. This, in conjunction with the fact that the tribunal has refused to lay down minimum standards regarding a gender neutral job classification system, limits the effect of litigation on the vast majority of women not involved as a applicant in the case. A possible solution would be for the

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[78] Fudge and McDermott op cit 63

[79] *Ontario Nurses Association v Haldimand-Norfolk* (No 1-4) (1989) 1 P.E.R 49 *& O.N.A v Women's College Hospital* (1990) 1 P.E.R., 179 at 183

[80] Fudge and McDermott op cit 73

government to enact basic minimum standards for a classification of this nature.

The Ontario Equal Pay Act has another inherent inadequacy. Many types of employment performed by women do not have suitable male comparisons. Female employees in, for example, day care centres, libraries, community and social centres and small health care services, find it difficult to find male comparators as these jobs are 'dominantly female sectors.' The result is that these female employees are effectively excluded from equal pay adjudication in terms of the act. Sue Findley[81] states however that feminists have taken up the issue with the government, stakeholders have been lobbied, by the feminists and representations have been made to the Equal Pay commission. Ultimately, it is a political decision to be taken by the government of the day.

Is the reader to believe that the Ontario Equal Pay Act is not as impressive as initially hailed by the New York Times? Feminist activists are not 'overjoyed' yet. It is a good first step, but still contains all the flaws of a reform that is the result of years of negotiation. The act is simply a compromise, and to a large extent, "an inevitable compromise engineered in the policy making process of the state."[82]

E.5 Sweden and other Nordic Countries

In Sweden, Norway, and Finland woman activists have been interested in pay equity since the late 1970's. Yet it was not until 1987 that women's' rights activists initiated their campaigning for a comparable worth or equal value approach to pay equity. The Swedish Act Concerning Equity Between Men and Woman 1991 is not concerned with discrimination chiefly, but with employment. It is

[81] Findley 'Making Sense of Pay Equity: Issues for a Feminist Political Practice' University of Toronto press 1990 81
[82] ibid 81

considered by many to be very progressive. The Swedish model imposes an obligation upon employers to promote equality in working life. The Act allows the employer with the opportunity to devise measures to meet its obligations in terms of the act. There is a particularly broad commitment to the promotion of equality.

Sweden is recognised as one of the leading countries in the field of pay equality. What are the reasons for such a relatively late start regarding one of the most contentious issues of the equality campaign, namely comparable worth or equal pay for work of equal value? One of the reasons may have been that the wage gap between men and women was relatively small. For example, in 1985 full-time women employees earned 78[83] per cent of the earnings of men and women production workers in private manufacturing earned almost 90 per cent of the earning of their male counterparts, although these women only comprised 15 per cent of the total female workforce in the entire country. In the largest categories of female workers in the country, clerical workers in the private sectors and the care workers in the public sector, womens' earnings were 73 per cent of the male workers' salaries. Norwegian and Finnish women in these sectors earned slightly less in comparison to male workers at 71 per cent in 1988. In the United States and Canada, the comparable worth movements were active earlier, but they also had a greater wage gap between the income of men and women. In the corresponding time in Canada and the United States, the wage gap between the sexes was relatively high, in that the women earned only 64 per cent of the male income. The relatively small wage gap in Sweden and the Nordic countries reassured women's rights activists, and efforts and initiatives toward pay inequality were relaxed.

Another possible reason for Sweden's late start is that almost all wages in Sweden are set by collective bargaining rather than by legislation as in the US and Canada. In the 1950's the Swedish blue collar workers trade union confederation established a gender

[83] Fudge and McDermott op cit 247

sensitive wage policy. Unionisation has always been high in Sweden. For example, in 1987, 97 per cent of the employees were unionised compared to 17 and 35 per cent in the US and Canada respectively. The union strategy was to pursue wage equality by means of disproportionate raises for low income workers, achieved by co-ordinated bargaining. The low income group comprised mainly of women, with the result that they benefited more than women in the higher income bracket. There were separate wage scales for women and men which resulted in women receiving higher wage increases due to the union wage equity bargaining policy. After 1965, the wage scales were abolished, but women continued to benefit as a direct result of the gender sensitive wage bargaining policy. Women therefore received a larger percentage increase than men at most of the bargaining tables. Statistics indicate that in 1973, full-time women employees annually earned 71.5 [84] per cent of the earnings of comparable men. By 1985, the percentage had increased to 81.5 per cent. The relatively high wage gains for women was a direct result of the high unionisation figure, and the trade union's commitment to the fight against sex- based wage discrimination.

A third possible reason, was the close relationship between the trade unions and the government of the day, the Social Democratic party. The Social Democrats ruled almost without interruption for fifty years, and their state policy for the public sector was similar to the union's pay equality views. Wage gaps declined almost in every sector. From 1983, however the wage gap between full-time female employees and their male counter parts increased. The reason for the turnabout may have been the virtual abandonment of wage equity bargaining policy by the unions, and a weakening of the co-ordinated bargaining strategy, due to neo-liberal ideologies favouring market related arguments, which only recognise such factors as efficiency, productivity, growth, competition and profit. Joan Acker indicates that her research in the banking sector has show that;

[84] Fudge and McDermott op cit 248

"as soon as measures pressing for equalisation are no longer in active use the underlining process creating the wage gap reassert their effort and the wage gap increases." [85]

Feminists and gender activists have responded to the increased wage gap by putting in place certain mechanisms to prevent a further deterioration of the situation. The trade unions are currently administered by men and it has been said that wage equity, is sometimes seen as bargaining cards that can be forfeited to achieve their goals. There is however a growing percentage of women entering the work force and are becoming an ever larger portion of the trade union membership. To date the largest unions are now woman predominant[86] unions and their leadership is changing accordingly. Trade union and management contracts make financial provision for the combating of sex inequality, and union staff are currently exploring different ways of determining under valuation and inequity

There is in addition an extra-parliamentarian and informal community of woman who have received government funding, together with other blue-collar and white-collar trade union affiliate educational organisations, to embark on a national wage equity education programme.

The Nordic Council of Ministers have initiated a new Nordic Project on Pay Equity in motion to support and assist with the particular initiatives in each country. It deals extensively with the comparable worth, or equal pay for work of equal value issues, and the development of new statistics to reflect the economic problems of women.

E.6 South Africa

[85] Joan Acker quoted by Fudge and McDermott op cit 249
[86] Fudge and McDermott op cit 250

In South Africa there is no specific anti -pay discrimination legislation apart from the Constitution and the Labour Relations Act[87] under the unfair labour practice jurisdiction. It was confirmed in *SACWU v Sentracem LTD and Others*[88] and *Sentracem v DR John NO, the President of the Industrial Court, SACWU and Others* [89] that racially based wage discrimination between employees doing the same job falls squarely within the ambit of the 1956 unfair labour practice jurisdiction.

In the early 1990's, the previous government attempted to enact the Equal Opportunities Draft Bill.: Section 6: of the draft bill states

'Where an employee performs the same work or work of the same value than that which is performed by another employee of the opposite sex in the employment of the same employer, and
(a) the first mentioned employee's contract of employment, solely on the ground of his or her sex, contains a term which is less favourable for such employee than a similar term in the last mentioned employee's contract of employment, the clause of the first mentioned employees contract of employment shall be deemed to have been adjusted so that it is not less favourable,
(b) the first mentioned employee's contract of employment, solely on the ground of his or her sex, does not contain a term which the last mentioned employee's contract of employment contains, and of which the effect is to place the first mentioned employee in a less favourable posision than the last mentioned employee, the first mentioned employee's contract of employment shall be deemed to also contain such term.
Subsection (1) shall for a period of two years after the commencement of this section not apply to contracts of employment existing at such commencement.

The introduction of a sex equalisation instrument was long overdue, but the form and contents were sharply criticised. Christie et al.[90]

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[87] Act 66/1995
[88] (1988) 9 *ILJ* 410
[89] (1989) 10 *ILJ* 249 and at 259 C-D Coetzee J held 'It is common cause between the parties that any practice in which a black person is paid a different wage than a white person doing the same job having the same length of service, qualifications and skills is a labour practice of wage discrimination based on race and that it constitutes an unfair labour practice. Like them I have no doubt that this is the correct exposition of the law.'
[90] Christie et al 'Background paper on the Promotion of Equal Opportunities Draft Bill' July 1993

drafted a particularly comprehensive document dealing with the proposed bill. At the outset, Christie indicated that the draft bill is negative and defensive in dealing with disadvantage. It relies exclusively on a ban of discrimination, an approach which rests on an assumption that a merely formal understanding of equality is sufficient to ensure equal distribution of benefits among all of society. The authors explain that formal equality assumes that all people enjoy a substantive equality, and that disadvantage only exists as a surface aberration.

Another shortfall of the formal equality provisions is their reliance on a male comparator and this presupposes something which one wants to be equal to, this inevitably being the middle class white male with little family responsibilities. We shall return to the issue of comparison below.

The authors indicate a clear preference to a bill that focuses on the concept of equality rather than on the concept of discrimination. Regarding the Equal Pay provisions, the authors were of the opinion that the crucial problem in enforcing equal pay legislation is that the disadvantage women experience goes further than the situation where women perform the same work as and receive less pay. This type of discrimination typically operates in a less obvious manner, especially in job evaluation studies. One reason for this is that women are concentrated in jobs which appear to be extensions of house work, such as, nursing, secretarial, child-care work and domestic work. These jobs are extremely badly remunerated compared to traditional male jobs even though they may require equivalent, effort, skill and experience.

The authors welcome the bill reference to 'work of the same value' instead of the 'same work' as the ground of comparison. They are, however, in favour of the more internationally accepted and widely used terminology, 'work of equal value.'

Christie et al. has formulated the following problems regarding the equality clause. Firstly, the clause does not provide guidelines in terms of which the courts are to interpret the 'same value' and other terminology. As seen from the previous discussions the interpretation of terminology in equalisation legislation is a complex and technical procedure which calls for expert industrial and sociological skills, which are sadly lacking in courts the world over. A particularly perplexing exercise is determining whether formal job evaluation systems implemented by the employer are gender neutral. Parties would revert to expert evidence at a trial but ultimately the court has the task of evaluating the evidence and finally handing down a judgement. The courts may be severely handicapped in the absence of clear guidelines. The authors indicate that guidelines regarding a suitable comparator are essential, as this proves to be a particular stumbling block in equal pay access.

Secondly, the Bill states that the compartor must be employed by the same employer as the applicant. The authors indicate that this form of limitation is disastrous and may potentially render the Bill ineffective, as it only covers the obvious case, and not women working at a lower income scale where no suitable male comparator exists.

Perhaps due to the above and the other criticisms, the proposed bill was abandoned. Important and constructive objections to the bill are being consideration in the drafting process of replacement legislation viz. Employment and Occupational Equity Act. The government's green paper on Employment and Occupational Equity is currently open for discussion and does not only deal with unfair discrimination in general terms, but with pay discrimination in particular. (It is noteworthy that the green paper identifies equal remuneration for the same work and for equal value.)

The Labour Relations Act[91], enacted on the 1 November 1996, prohibits unfair discrimination under a larger definition than that contained in the 1956 act, including unfair sex based wage discrimination.

In Schedule 7, of the 1995 LRA [92] a residual unfair labour practice is defined as:

"any unfair act or omission that arises between an employer and an employee, involving (a) the unfair discrimination either directly or indirectly, against an employee on any arbitrary ground, included but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status, or family responsibility; (b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provisions of benefits to an employee,..."

As the subtitle to Schedule 7 indicates that it contains transitional arrangements, we expect a new act, probably the government's green paper on Employment and Occupational Equity, to deal with discrimination and pay equality specifically. Although the LRA does not deal with pay discrimination per se, it is certainly incorporated in the direct and indirect discrimination concept. It is noteworthy that the anti-discrimination definition in the LRA is wider than that contained in the ILO's convention.[93]

Clearly, the definition is extremely wide, not only due to the inclusion of direct and indirect discrimination, but of all discrimination aimed at an employee on arbitrary grounds and not limiting the grounds to those numerated. The definition does not indicate whether the applicant's case is limited to a comparison of work which is the same, similar or of equal value. It is submitted that the courts will interpret the definition and in light of all the circumstances and decide whether the discrimination is unfair.

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[91] 66 / 1995
[92] item 2 (1) (a)
[93] convention 111 of 1958

However, one cannot perceive the court venturing beyond the international interpretation of equal pay for work of equal value. The second part of the definition specifically numerates grounds on which the employers unfair conduct will be deemed a residual unfair labour practice, benefits which may (absence of judicial interpretation) include remuneration and perks, promotion, demotions and training of employees.

It is noteworthy that item 2(1) (a) & (b) does not limit action for equal pay to instances of gender discrimination, as the legislation is formulated at present, pay discrimination is equally applicable between same sex parties and is not limited to a racial or sex basis. If a disparity between co-employee's remuneration cannot be supported by corresponding differences in the value of their respective jobs, or by other criteria, the employer is guilty of unfair pay discrimination. The legislation does not suggest grounds on which discrimination may be justified, it simply outlaws unfair discrimination. We shall return to possible defences and court interpretations below.

F. THE EQUAL PAY PRINCIPLE

I shall discuss the equal pay principle with special reference to (a) the onus of proof (b) the comparator, (c) the comparison, (d) pay, (e) job evaluation systems, (f) defences which are essential in conducting a case of this nature.

Initially, the concept of equal pay seems to be straight forward but as one becomes familiar with international perspectives, one soon realises the complexities of the issue and begins to question and the effectiveness of the remedies in the past. Equal pay extends beyond the concept that all employees doing the same or similar work should receive the same remuneration. It suggests that employees should not be discriminated against regarding their remuneration. This rule is not without qualification, as unequal remuneration is not unfair per se; however when a difference in remuneration exists, the basis of this

differentiation must not be a generalised assumption about the characteristics of a particular group of people.

Van Niekerk[94] argues that differences in pay would be legitimate provided the basis thereof is productivity, length of service, or skill, but not if differences were based on race, gender, religion or ethnic origin. Therefore, employees black or white, male or female, if similarly qualified and experienced, and engaged in the same work, should not receive different remuneration. Campenella[95] suggests that discrimination in pay exists when a woman is doing a job which is 'ranked equal' to the job done by a man, and she receives less payment.

As mentioned elsewhere discrimination presupposes unequal treatment, and therefore the very nature of discrimination requires comparisons. One job is being compared to another. As we have, seen the International Labour Organisation has indicated that the basis of comparison should include work of equal value. Same work and similar work as a basis of comparison continue to be most universally accepted, as the concept of work of equal value remains controversial. The International Labour Conference, however, has reported a sharp increase in countries who have enacted the principle of equal pay for work of equal value. These countries include Argentina, Brazil, Canada, Equatorial Guinea, France, Federal Republic of Germany, Greece, Haiti, Iceland, Indonesia, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Philippines, Portugal, Somalia, Sweden, United Kingdom, Denmark, and Finland.[96]

Some countries have standardised job evaluation elements. They include:

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[94] Van Niekerk 'Preventing and Providing Workplace Discrimination' *Current Labour Law 1995* 85
[95] Campanella 'Equal Pay -The Price of Equality' *Labour Law News and Court Reports* 1993V4 N5 3
[96] International Labour Conference 'Equal Remuneration' 72 edition 1986

- Hours of work, which are equally applicable to men and women, and may be considered neutral for purposes of sex-based wage discrimination.
- Performance appraisals to job evaluation, calling for a value judgement of an employee, these may refer to a job or task performed, or to the employees input or output;
- The employee's skill, qualification and aptitudes, or the quality of the work, the volume of the work,
- Efficiency- In the Turkish Labour Act or Employment Standards Stature,[97] for example, no distinction shall be made on grounds of sex between the wages paid to male and female workers performing jobs of the same nature and working with equal efficiency. Similarly, some South and Central American countries provide, in their respective labour codes, for equal pay for equal work performed with equal efficiency in the same category.[98] It is submitted that the term efficiency, would also be equally problematic for interpretation as the efficiency is not always easily measured,(in jobs such as long terms researchers etc).
- Quantity and quality of work have been included in some European countries.[99] The criteria seems to have shifted its emphasis from the individual to the product or object being produced;
- Job requirements. These may include skill (qualification required, degree or diploma), effort (physical or mental), accountability, and work conditions (including health hazards and physical danger).

F.1 THE ONUS OF PROOF

Discrimination in pay equity cases is often difficult to prove, particularly when it is indirect and arises from job evaluation or classification systems. Applicants may encounter difficulty in substantiating allegations of discrimination, as they may lack the access to the necessary pay records. For these reasons we encounter

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[97] section 26(4)
[98] Countries include, Columbia, Costa Rica, Guatemala, Honduras, Mexico, Panama, Paraguay, Venezuela.
[99] Germany, Czechoslovakia, Angola and Byelorussian SSR

governments reversing the onus of proof, placing it instead on the employer to show that he/she is not discriminating.

In the Federal Republic of Germany, their 1980 Equality of Treatment Legislation reverses the burden of proof that 'material reasons unrelated to a particular sex justify differential treatment, where the applicant has established facts that afford grounds for assuming that discrimination has occurred on account of his / her sex.[100]

In France, the employer bears the onus to prove or justify the inequality of pay under the equal pay provisions introduced in the Labour Code in 1983. According to section 5 of Act 83-635 Amendment to the Labour Code and Penal Code, the worker shall have the benefit of any doubt which remains after consideration of the various elements of the matter.

In Sweden, when an employer provides less favourable conditions of employment for a worker compared to a worker of the opposite sex, and their work is regarded as equal or of equal value in the light of an agreed assessment of the job, it is deemed that discrimination on the based of sex has occurred. The employer would be liable if he / she is unable to show that the different conditions of employment are related to differences in the worker's material qualifications for the work or that the differences are not in any way related to the worker's sex.

In Zimbabwe,[101] according to the Labour Relation Act, the employer action would be deemed to discriminate if his act or omission causes or is likely to cause persons of one sex to be treated less favourably than persons of the other sex in his / her employ.

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[100] section 1 The Labour Law Act European Communities Harmonisation 1980
[101] section 5(6) of the Labour Relations Act no 16 of 1985

In the UK the onus of proof is distributed depending on the specific facts. The position, according to Bourn and Whitmore,[102] is as follows:

- In direct discrimination cases it falls upon the applicant who alleges the discrimination.
- In an indirect discrimination case it falls upon the party alleging discrimination, except as to the question of justifiability, where the burden is upon the party attempting to justify the requirement or condition.
- Where a party alleges that the case falls within one of the exceptions to the Acts, that party assumes the burden of establishing that this is so.
- Where a non-discrimination notice (a formal investigation conducted by one of the Commissions) has been issued, the burden falls upon the party alleging that the Commission requirement is unreasonable. For example an incorrect finding of fact.

The standard of proof in Britain, as in South Africa, is the equivalent to that of civil cases. Thus the standard of proof is on a balance or preponderance of probabilities.

The South African Labour Relations Act is silent regarding onus of proof in pay equality cases. In the UK, once a women has proved that she is paid less than a man in the same employment doing like work (or work related as equivalent or work of equal value), it is presumed that the variation between her contract and his contract is due to the difference in sex. [103]

In the absence of legislation placing the onus on the employer the general principles regarding the rules of evidence should be adhered to. The applicant, therefore, bears the onus to prove that she receives less pay compared to a co-employee, and that both employee's jobs

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[102] Bourn and Whitmore op cit 57

[103] Pannick *Sex Discrimination Law*, (1985)106 quoting *National Vulcan Engineering Insurance Group v Wade* (1977) *ICR* 455 (EAT)

are comparable. The exact extent of the word 'comparable' is open to court interpretation. The burden of proof then swings to the respondent who may lay down a defence.

According to Rycraft,[104] in regard to proving the adverse effect of general discrimination in the US; "*...the plaintiff has the burden of proof with the ultimate inquirery being whether or not a substantial adverse impact is shown by the weight of all evidence. The burden then shifts to the employer to demonstrate a business necessity for the practice, which is generally done by showing that the requirements are job related.*"

F2. THE COMPARATOR

To establish pay discrimination, the applicant must compare his or her position or job category to that of another employee. Unfortunately, the act does not provide for assistance. One has to visit foreign law and decide whether it applies in our case. Pannick[105] states that to establish like work, work rate as equivalent, or work of equal value to that of a man in the same employment, the applicant must have a male comparator. The applicant needs to prove that her work is the same, similar or of equal value to that of the male comparable and that she is receiving less pay than him.

(a) Opposite Sex

In *Meeke v UUAAW* [106] the applicant, a part-time secretary, was found to be subject to indirect discrimination in comparison to the full-time secretaries. Although the claim fell within the equal pay legislation, the claim was dismissed essentially due to the absence of a male comparator. Section 1 (13) of the Equal Pay Act guarantees men equal pay with women, as well as guaranteeing women equal pay with men, but not equal pay among the same sex.

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[104] Alan Rycroft 'Preventing and Proving Work-Place Discrimination' (1994) *ILJ* 730
[105] Pannick op cit 95
[106] (1976) *IRLR* 198

In SA, the residual unfair labour practice definition certainly includes sex-based wage discrimination, but the absence of specific equal pay legislation between men and women creates the basis for the argument that the applicant and comparator may be of equal sex. The Residual Unfair Labour Practice prohibits arbitrary discrimination and therefore the applicant may institute action on this basis.

(b) The Same Employer

Does the comparator have to be employed by the same employer? Bourn & Whitmore[107] (UK) state that a woman can only make her comparison to a comparator who is in the same employment. Section 1(6) of the Equal Pay Act[108] specifically states that:

"*Men shall be as in the same employment with a women if they are men employed by her employer or any associated employer at the same establishment...*"

According to the Act[109] one is an associated employer when: "*one is a company of which the other (directly or indirectly) has control of if both are companies of which a third person (directly or indirectly) has control.*"

It is noteworthy that the act restricts the definition of employers to companies, and makes no mention of the different departments in the public service. The position regarding the public service was dealt with *in Gardiner v London Borough of Merton.*[110] In this case the court concluded that the word corporate does not cover all bodies corporate, and that two local authorities would not be considered as associated employers.

The Labour Relations Act does not define the term 'employer', but its definition of employee:

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[107] Bourn & Whitmore op cit 157
[108] Equal Pay Act 1970
[109] section 1(6) (c) Equal Pay Act 1970
[110] (1980) *IRLR* 727 quote by Bourn & Whitmore op cit 159

" *any person, excluding a independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and any other person who in any other manner assists in carrying on or conducting the business of an employer,..*"

This is clearly a broad definition, it assists one with the interpretation of employer. The 95 LRA incorporates, for the first time, the public sector as a employer. In the absence of case law and specific legislation, it is an open question whether a comparator from a different state department would suffice.

The identification of the employer in a conglomerate of companies is problematic and open to court interpretation. It would be extremely difficult to speculate in the absence of specific legislation. The definition of employee in the LRA does not indicate whether indirect 'work' for another qualifies that person as an employee. The definition indicates that a person who in any manner assists in carrying on his business is an employee, but this does not solve the question of multiple companies.

(c) The hypothetical or non-contemporaneous male comparator

The hypothetical or non-contemporaneous male comparator is another controversial issue. In the UK, the Equal Pay Act calls for the comparator to be an actual person in contrast to the Sex Discrimination Act[111] which allows for the comparator to be hypothetical. There have been calls from the Equal Opportunities Commission for the amendment of the Equal Pay Act in this regard.

The European Court of Justice[112] have indicated that an applicant is able to compare her remuneration with that of her male predecessor, and found that the comparator need not be in contemporaneous

[111] Sex Discrimination Act 1975 'treats her less favourably than he treats, or would treat a man'
[112] *McCarthys v Wendy Smith* (1980) *ECR* 1275

employment. The US position[113] is similar, and the court has indicated that non-contemporaneous comparator is acceptable.

The SA position is not clear, and the existing legislation sheds no light on the issue. The LRA indicates that one of the primary objectives of the act is to give effect to South Africa's obligations as a member state of the ILO. Although to date these conventions have not been ratified, our courts will give considerations to these conventions and foreign law. The Court may find that fairness dictates that a hypothetical comparator is acceptable in line with the US and ECJ.

F.3. PAY, WAGE, REMUNERATION

The Treaty of Rome, article 119 provides for an wide interpretation of pay. It includes payment in cash and kind whether directly of indirectly received from the employer for performing his or her duties.

The ECJ found in *Defrenne v Societe Belge de Navigation Aerienne*[114] that pensions established by a statutory social security fall outside the definition of 'pay.' *Bilka- Kaufhaus v Weber van Hartz*[115] held that supplementary pension schemes, in addition to statutory social security schemes, fall within the ambit of article 119 of the Treaty of Rome.

The UK Equal Pay Act indicates that the equality clause relates to terms (whether concerned with pay or not) of a contract under which a women is employed,[116] except for those terms excluded by section 6(1). An example of an exclusion might be provisions relating to death and retirement, other than a term which in relation to retirement, affords access to opportunities for promotion, transfer or

[113] *Hodgson v Behrens Drug Co* (1973) 475 F 2d 1041 quoted by Pannick op cit 95
[114] (1976) *ICR* 547 referred to by Van Niekerk op cit 3
[115] (1986) *IRLR* 317 referred to by Van Niekerk op cit 3
[116] Equal Pay Act 1970 section 1(2)

training or provides for a women's dismissal or demotion.[117] The exclusions have been challenged in light of the 1975 EEC directive which states that all discrimination regarding remuneration on grounds of sex must be eliminated. The equality clause does not extend to those contractual terms extending to women receiving special treatment, ie. pregnancy and childbirth leave. [118]

The US court[119] rejected the argument that women should contribute higher premiums to a pension fund because they have a higher life expectancy and found that Title VII of the Civil Rights Act required employees to be treated as individuals and prohibits group based sex classification.

The LRA[120] defines remuneration as:
means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for the person working for any other person, including the state, and numerate has a corresponding meaning.

This is a wide definition and in absence of court interpretation thereof, Van Niekerk[121] correctly states that it is difficult to see why payment to an employee in respect of a pension fund should not constitute remuneration in terms of the residual unfair labour practice. Although Van Niekerk was referring to the 1956 LRA and consequently the unfair labour practice created therein.

Item 2 (1) (b)[122] refers to 'benefits' instead of remuneration. The act does not define benefits and Du Toit et al suggest that the prohibition of unfair discrimination applies to; "all benefits flowing from employment and is not restricted to remuneration in any narrow sense." The Oxford dictionary defines benefits as, allowance payable.

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[117] Equal Pay Act 1970 section 6 (1) (b)
[118] Bourn and Whitmore op cit 152
[119] *City of Los Angeles v Manhart* (1978) 435 US 702
[120] Act 66 / 1995
[121] Van Niekerk op cit 3
[122] Schedule 7

F.4 THE COMPARISON

In the absence of specific legislation regarding the basis for comparison, it is an open question whether the courts will entertain a claim based on a comparison of same work, similar work or work of equal value. The EC has taken a tough stance against sex-based wage discrimination and pressured their signatories to accept the comparison of equal value. The UK has amended their legislation to comply, but the US, in the interpretation of the Equal Pay Act, has rejected equal value or 'comparable worth' in favour of 'substantially equal' work. However, in the interpretation of the Civil Rights Act the concept of equal value was accepted.

The three categories of comparison accepted in the UK are:

- Same work or like work, has been interpreted to mean that the work must be the same or broadly similar, and whatever differences there are should not reasonably give rise to a difference in pay, or require putting the job into another category;.

- Work rated equivalent has been interpreted to mean, A job evaluation study, accepted by both parties, rates jobs as equivalent,

- Work rated of equal value, affords the applicant the opportunity to challenge a job evaluation study if the employee regards her work as undervalued by comparison and the jobs compared are not the same or rated equal. Equal value claims *"place the adjudication of equal pay claims of this nature in the realms of the arcane science of job evaluation."*[123]

F.5. Job A v Job B - elements of comparison

[123] Van Niekerk op cit 5

If a person wishes to institute action against the employer on the grounds of sex based wage discrimination, there are characteristics which are to be compared in both jobs. Du Toit et al [124] is of the opinion that although the UK courts consider factors including effort, skill and decision, the following guidelines are to be followed:

- Work valuation is to be considered on demands made on the employee and not on the economic value to the employer,
- The job characteristics, as opposed to the characteristics of the incumbent, are to be considered,
- Analytical job evaluation techniques are preferred to non analytical techniques.

Christie et al,[125] in their enquiry into what constitutes work of comparable worth, have suggested the following elements to be considered:

- the level of qualification required;
- the amount of skill and experience required;
- the hours of work and the amount of effort required;
- efficiency;
- the amount of responsibility entrusted to the worker;
- the seniority of the worker;
- the conditions under which such work is performed; and
- any other relevant factor.

The above indicates that all relevant factors regarding job evaluation are to be applied. Where a job classification scheme is in place, and the employee believes that his / her job is undervalued, and wishes to challenge it, it is to be conducted on grounds of an equal value claim.

F.6 JOB EVALUATION SYSTEMS

[124] Du Toit et al op cit 399

[125] Christie De Paiva Murray O' Regan & Thomas ' Submissions on the promotion of an Equal Opportunities Draft Bill' *Current Labour Law* (1993) 127

The EC's (then known as the EEC) Equal Pay Directive requires job classification systems to be based on the same criteria for both, and not have the effect of discriminating on the grounds of sex.

It is argued that a job evaluation system which appears to be neutral but indirectly has a negative effect on one sex, gives rise to controversy. The UK courts[126] have found that certain job ranking systems are inadequate, and have identified four principle job evaluation methods. These methods have been set out as follows:

- ***Job ranking*** *This is commonly thought to be the simplest method. Each job is considered as a whole and is given a ranking in relation to all other jobs. A ranking table is then drawn up and the ranked jobs grouped into grades. Pay levels can then be fixed to each grade.*
- *"**Paired comparisons** This is also a simple method. Each job is compared to as a whole with each other job in turn and points (0,1,2) awarded according to whether its overall importance is judged to be less than, equal, to, or more than the other. Points awarded for each job are then totalled and a ranking order is produced.*
- ***Points Assessment*** *This is the most common system in use. It is an analytical method, which, instead of comparing whole jobs, breaks each job down in a number of factors-- for example skills, responsibility, physical or mental requirements and working conditions. Each of these factors may be analysed further. Points are awarded for each factor according to a predetermined scale and the total points decide a job's place in the rank order. Usually the factors are weighed, so that for example, more or less weight may be given to hard physical conditions or to a high degree of skill.*
- ***Factor Comparison*** *This is also an analytical method, employing the same principle as points assessment but only using a limited number of factors such as skill, responsibility, and working conditions., A number of key jobs are selected because their wage rates are generally accepted to be fair. The portion of the total wage attributed to each factor is then decided and a scale produced showing the rate of each factor for each key job. The other jobs are then compared to this scale, factor by factor, so that a rate is finally obtained for each factor for each job. The total pay of each job is reached by adding together the rates of the individual factors."*

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[126] *Eaton LTD v Nuttal* (1977) *ICR* 272 EAT referred to by Bourn & Whitmore op cit 161

Irrespective of which grading system has been selected by the employer, wage discrimination will result simply because all employees do not receive the same remuneration. The differentiation however, must be justified. Bourn and Whitmore suggest;

"*A study is said to be discriminatory where the value set under that study is not justifiable irrespective of the sex of the person on whom the demands are made.*"

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In *Bilka-Kaufhaus v Weber von Hartz*[128] the court ruled that a practice or policy which has a discriminatory effect is only justifiable if the means chosen for achieving the policy objective correspond to a real need on the part of the undertaking, and is appropriate and necessary with a view of achieving the policy objective in question. The objectives in the job evaluation system must also be objectively necessary to the undertaking. Bourn and Whitmore[129] conclude; "*gross and obvious distortions which undervalue the contribution of women workers to the enterprise might not be justified. Where the results fall within that area in which reasonable and informed persons might legitimately disagree, the results are likely to be seen as justifiable.*"

In South Africa, the Industrial Court was approached on the matter of job evaluation in *SA Yster en Staal en Verwante Nywerhede Unie v Yskor BPK.*[130] The matter involved racially based wage discrimination whereby the employer refused to combine two job categories. The effect was that a difference in pay existed between the employees, despite the argument by labour that the work performed was similar. The courts entertained the application attacking the job grading system. Unfortunately, the respondent raised a premiere point and was successful. The court found that the employer's refusal to comply with the demand to combine two job categories did not effect existing rights because the employees in the lower categories had never previously had the rights which they claimed in the first place.

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[127] Bourn and Whitmore op cit 198
[128] (1986) *IRLR* 317
[129] Bourn and Whitmore op cit 169
[130] (1991) 12 *ILJ* 1038 (IC)

The decision has been criticised[131] as it would have far reaching negative effects on the equal pay actions. The fact that the finding of unfairness would result in higher wages does not automatically render it a dispute of interest.

In South Africa there are five generally accepted job evaluation systems. These are the Paterson, Hay-MSL, Castellian, the NIPR's Q and Perommes systems. Paterson, the most popular in SA,[132] is a simplistic system based on a single factor, decision-making. The other systems consider other factors, such as problem solving, knowledge, educational qualifications, training and experience. The Hay-MSL system, is based on three similar factors: problem solving, know-how and accountability. It has been argued that this system contains elements of a 'distinctly managerial bias',[133] and as there are few women managers, it is also a sexist bias. These evaluation systems therefore appear to favour male white-collar jobs. These job evaluation systems, for instance, do not rate heavy physical or manual work under dangerous conditions as an important factor which may require higher compensation.

The British Labour Research Department has published a paper on the criteria for judging a job evaluation system, and have numerated six categories of possible factors, and have in turn divided those into sub-categories. All these categories attempt to establish which factors in the evaluation system traditionally favour male or female jobs. The results were that only three factors favour women outright, which are caring, dexterity, and typing and keyboard skills. Ten sub-factors involving interpersonal skills favoured women slightly. The following six factors strongly favoured men: length of service, experience, heavy lifting, physical hazards, spatial ability and unpleasant working conditions. There were 21 sub -categories which favoured men slightly. All the factors were used in pay equality job evaluation

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[131] Louw op cit 322

[132] Budlender 'Human Resource Development and Gender Affirmative Action' C.A.S.E publication 21

[133] Hollway Wendy 'Fitting Work Psychological Assessment in Organisations 1984 Methuen, London

systems. Budlender[134] makes the point that unpleasant working conditions for instance, should not be rated in a job evaluation while concentration, a factor which favours women, is not. The Labour Research Department states that most job evaluation systems are problematic, however, alternative methods of determining pay is often pure convention and prejudice.

Budlender[135] suggests that the systems commonly used in South Africa are biased against women and illustrates this bias in an analysis of decision-making as a rating factor. Budlender raises questions pertaining to the meaning of decision making and the effect thereof on someone who is employed simply to take orders, such as a secretary. She concludes that the Patterson system simply rewards power, and currently more men wield power than females in the workplace.

In the UK, an industrial tribunal may consider the fairness of a job evaluation study. If the study attaches disproportionate weight to factors which favour men, it paves the way for an equal pay claim.

A factor which has proved to be both necessary and controversial is productivity. There are those who directly link productivity and wage. Budlender[136] alerts the reader to the fact that employers and trade unions are negotiating productivity related payment schemes. Therefore there is an undervaluation of the non-productive categories of workers within the productive sector. Another problem the author addresses is the extreme difficulty of objectively measuring productivity. Studies in foreign countries indicate that incentives and productivity bonuses again do not advantage men and women equally. The reasons being that there is a tendency for women to be employed largely in non-manual work and employers target for reward those

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[134] Budlender op cit 22
[135] Bublender Pay Equity Juta's Gender Equality Seminar 28 November 1994
[136] Bublender op cit 23

workers whose jobs are directly linked to output. The other workers are excluded.

Budlender[137] is of the opinion that the fallacy of the argument that pay received is determined by an objective evaluation of the content of the job, is born out by the fact that certain jobs, such as managing director and other top management personnel, are excluded from scrutiny by these evaluation studies. The author indicates that as with psychometric tests, the claim that the valuation or gradings and remuneration are rigid, scientific and non-negotiable, is questionable.[138]

The British Labour Research Department[139] states:

"Work study is not a science, and... all the different techniques should be seen for what they are : a combination of observations, records, mathematical treatments and guesswork which has been refined and developed and placed in the hands of management."

F.7 DEFENCES OR JUSTIFICATION

The ILO 's equal remuneration convention No 100 of 1951 provides that: *"any distinction, exclusion or preference in respect to a specific job based on the inherent requirements thereof shall not be deemed to be discrimination."* [140]

Article 3 of the same convention, clearly states that certain disparities in remuneration are justified:

"[disparities] without regard to sex, to differences, as determined by such objective appraisal,... shall not be considered contrary to the principle of equal remuneration... for work of equal value."

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[137] Bublender op cit 21
[138] Budlender op cit 21
[139] Labour Research Department 'Bonus schemes: A Negotiators' Guide' LRD London 6 referred to by Budlender op cit 23
[140] Equal Pay Act 1970 section 1(2)

Capanella[141] suggests that differentiation in remuneration based on the evaluation of job content shall be justified.

(a) *Material factor which is not the difference of sex*

Unlike South Africa, the British employer is provided with a statutory defence. In equal value cases the employer is required to prove that the variation in pay "is genuinely due to a material factor which is not the difference of sex."[142] In like work and work rated equivalent cases the employer is required to prove that this factor is "a material difference between the women's case and the man's."[143]

According to Bourn & Whitmore,[144] section 1(3) provides that the genuine material defence is only available if that difference in pay has been instituted in pursuit of an objective which corresponds to a real need on the part of the undertaking, is appropriate with a view to achieving the objective in question, and is necessary to that end.

In *Rainey v Greater Glasgow Health Board* [145] the court demanded that a material factor used in a defence must be "*significant and relevant, and it must be between her case and his. Consideration of a person's case must necessarily involve consideration of the circumstances of that case... where there is no question of intentional sex discrimination whether direct or indirect, a difference which is connected with economic factors affecting the efficient carrying on of the employer's business or other activity may be relevant.*"

Interpretation of 'material factor' has been interpreted differently in court. The court restricted the interpretation of material factors to those rooted in the personal equation between the employees. In the Rainey case, this was overruled, when the court accepted an

[141] Campenella op cit 3
[142] Equal Pay Act 1970 section 1(c)
[143] Equal Pay Act 1970 section 1 (1) (a) or (b)
[144] Bourn & Whitmore op cit 182
[145] (1987) *IRLR* 26 HL

argument by the employer that the difference between the two rates of pay was due to a material factor other than the difference of sex. The employer, the Health Board, employed private limb fitters at a higher pay equal to what they had received in the private sector. Various other defences have been raised:

(b) The administratively justified defence

In *Reed Packaging LTD v Boonzer and Everhurst* [146] two despatch clerks were paid according to a staff scale and the comparator was remunerated on the scale of a manual worker. The disparity was due to a collective agreement reached with different trade unions. The court found that the disparity was due to a material factor other than sex. It was held to have constituted an 'administratively justified reason' in accordance with the decision in Rainey.

(c) Red circling

Red circling takes place when an employer seeks to reconcile the demands of the equal pay principle with the demands of the labour market by creating special categories. This normally happens when an employer places employees, whose pay is adversely affected, in a protected pay category. In *Charles Early & Marriot v Smith*[147] The comparator had been red circled, and placed into a wage protected category after being transferred to a lower job category but retaining his former income. Other ticket collectors instituted a equal pay claim. The Court found that the employer had a good defence, as the higher pay was not originally based on any discrimination, and the reason for the red circling was not a sex- based one. However red circling has remained controversial.

Van Niekerk indicates that an employer relying on external market forces as a defence must prove a form of necessity, " in the sense that

[146] (1988) *IRLR* 332 E.A.T.
[147] (1977) *ICR* 700 (EAT)

the policy which creates a pay differential must be shown to be necessary to the achievement of a need on the part of the business. Mere convenience is not sufficient."

(d) Financial difficulties

In *Benveniste v University of South Hampton*[148], the plaintiff was appointed with less income than a person normally would have been with her qualification and experience. The employer argued that it was due to financial stringency at that stage. The court found that the material factor must be current at the time. The court held that the material factor 'evaporated' as soon as the financial constraints were removed.

In *Clay Cross (Quarry Services) v Fletcher* [149] the court rejected the defence by an employer for paying a woman less than a male comparator. The employer argued that the man, who was the only suitable applicant, would not come for less than he was already earning, or "I paid him more because he asked for more," or "I paid her less because she was willing to come for less." The court concluded that if any such excuse were permitted the act would become a 'dead letter.'

The Rainey case rejected the Clay Cross approach. The court accepted the employer's defence arguing the necessity of paying employees who were previously employed in the private sector, their existing (higher) wage. The court found that the difference between the two rates was genuinely due to a material factor other than the difference of sex.

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[148] (1989) *IRLR* 122 CA
[149] (1987) *IRLR* 361 CA

In *Jenkins v Kingsgate (Clothing Productions)*,[150] the European Court of Justice held that the difference in pay between full-time male and part -time female workers of like work, is not a contravention of the Article 119,

'in so far as it is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex."

In *Enderby v Frenchay Health Authority*,[151] the court held, in determining whether differences in pay between two equal categories of jobs are justified: "*whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question.*"

It seems clear from the ECJ decisions that market forces may in certain circumstances be regarded as a valid reason for pay differences for work of equal value. Van Niekerk[152] is of the opinion that the impact of these UK cases is not certain yet.

G. A REVIEW OF THE UK EQUAL PAY ACT 1975

The Equal Pay Legislation in the UK introduced the basis of comparison, equal value, in 1983. It was hailed as a 'brave new dawn' in the equal pay for women movement. Ten years later, however, *Labour Research* [153] published disturbing figures. The average earnings for female manual workers represented 63% of the figure for men and 64% in the case of non-manual work. The number of successful equal pay cases were equally startling. Only 22 cases had succeeded in a period of 20 years since the enactment of the Equal Pay Act in Britain.

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[150] (1981) *ICR* 592
[151] (1994) 1 CMLR 8 referred to by Du Toit op cit 400
[152] Van Niekerk op cit 7
[153] *Labour Research The equal Pay Failure* October 1993 Richard & Collard

The names of these matters have become well known for the simple reason that they have often take very long to conclude. The Quicks car garage case, for example, took eight years to reach its conclusion. Another aspect to this type of legislation is that once the applicant has received judgement in her favour, it only applies to her. For example, Julie Hayward, a cook employed by the shipyards, successfully litigated against her employer .The judgement however, only applied to her and not the other cooks in the shipyard, who would have to take the same exhausting route.

The reasons for the delay have been identified as procedural, as according to *Labour Research,* [154] a minimum of 14 different stages are required to complete an equal value claim. As Michael Beloff QC[155] has said, these claims are: 'A paradise for lawyers: hell for the women involved.' Apart from the general procedural steps of setting out the claim in writing and calling for discovery, the applicant at the first hearing must satisfy the tribunal on reasonable grounds that her work is of equal value to that of the comparator. If the job evaluation system rates the jobs differently, the applicant must show that there are reasonable grounds for deciding that the job evaluation system is sexually discriminatory. The employer has the opportunity to have the matter dismissed if it can be established that the pay variation is genuinely due to a factor other than the differences in sex. After all these prelimeries, the matter is ready to be heard on the main issue.

In *British Coal Corporation v Smith,*[156] *for example,* 1286 applicants embarked on an equal pay action between 1985 and 1988, but due to the extended procedure and 'lack of clarity in the law' the matter is not expected to be concluded by 1998.[157] The Labour Research[158] indicates that in the period between 1983 and 1992, a total 6443 cases were brought forward on the basis of pay equity, yet available

[154] Labour Researcher December 1993 1
[155] Queen's Council
[156] (1993) IRLR 308
[157] Labour Researcher op cit 5
[158] Labour Researcher op cit 5

figures indicate that only 27 cases had gone through the whole procedure. As stated earlier, 22 of these claims were successful.

There have been calls from the Equal Opportunities Commission as well as from judges for a review of the complete system. The government has responded by indicating that it is prepared to change the law and simplify the procedure and preliminary requirements. The Secretary of State for employment, however, has refused to make awards in favour of an applicant transferable to co-employees in the same workplace.

H. CONCLUSION

It is clear from the above that most nations referred to have found it necessary to enact specific equal pay legislation. It is submitted that the general anti-discrimination legislation in the LRA[159] effectively empowers the courts to rule against gender pay inequality. It is submitted that the powers given to the courts in terms of the general anti-discrimination legislation (outlawing direct and indirect arbitrary discrimination) are wider than specific pay instruments. We have seen from other nations that most specific pay equality legislation limits the bases of comparison to similar work or work of equal value and sets out statutory defences. Be that as it may, it is of paramount importance that issues are clarified and that parameters are identified.

(a) Green Paper on Employment and Occupational Equity

In the Green Paper, Policy Proposals for a New Employment and Occupational Equity Statute, equal pay is identified as one of the aspects which requires addressing. The green paper deals with statistics which point overwhelmingly to existing pay inequalities. It deals with factors leading to inequality both inside and outside the labour market. These factors range from discrimination of women to unpaid house hold labour attitudes.

[159] Act 66 /95

The green paper proposes an organisational audit which would require the Department of Labour to assist and provide guidelines for employers. All employers would be required to report regularly on key issues including equal pay and this information would then utilised for statistical purposes. This audit would be a source of information to employers on deciding how to implement a realistic and efficient method of affirmative action programs. Employers will be obliged to draft a proposal or plan of action to address imbalances caused by past discriminatory policies.

The green paper proposes that a labour inspectorate undertake workplace inspections. Bargaining Councils would play a role in the training and education of both workers and employers. The CCMA would take part in conciliation, mediation or arbitration. A party is able to approach the Labour Court only for reveiw purposes.

NALEDI[160] has indicated that a thorough overhaul of the labour market is required to rectify pay inequality in South Africa. NALEDI suggests that black as well as female workers are not able to achieve equality unless they have access to training and productive employment. NALEDI's broader economic strategy, is the following:

- legislation that works by empowering workers' organisations and protecting the workers most at risk of discrimination,
- centralised bargaining on grading systems and procedures, and on anti discriminatory measures in general,
- appropriate monitoring and appeals procedures,
- training programs directed at the disadvantaged, especially black women, and linked to career paths.

NALEDI proposes the following regarding legislation:

- a ban on unequal pay for equal work at all levels of employment and pay, rather than only on starting grades;

[160] National Labour & Economic Development Institute Research Report 'Equal Pay For Equal Work' 1995 15

- a similar ban on unequal benefits; including on the basis of gender, and
- a requirement that employers disclose information regarding employment, pay by race and gender.

NALEDI is in favour of centralised bargaining on pay, and grading is proposed to reduce inequalities. Provision should be made for a limited implementation time frame. The exemption of small businesses is not favoured as long as simple grading systems are in operation.

Roseland Nyman of NALEDI, stated[161] that she did not expect the proposed Employment and Occupational Equity Bill to be published in the near future. COSATU representatives are in the early stages of identifying issues and have not submitted proposals in this regard. The expected date of publishing a draft bill is in the second half of 1998. She was unable to comment on issues she suspects would be contained in the bill, save for her comments contained in the official NALEDI publication. Although welcoming the features contained in the green paper, Nyman concludes that, "*however the green paper does not go far enough in that it fails to propose quotas within a framework of clear timetables and enforcement procedures.*"[162]

The following issues should be included in proposed legislation:

- First, the basis of comparison should not be limited to same or equal work but should include equal pay for work of equal value.

- Second, the question of job evaluation systems requires definite guidelines, and as little as possible should be left to court interpretation, as this gives rise to lengthy trials with the leading of expert testimony. In a previous report[163], NALEDI raises

[161] Interview conducted on 13 February 1997 of NALEDI
[162] Nyman 'From Formal Equity To Equity: An Examination of The Green Paper On Employment And Occupational Equity' N.A.L.E.D.I. August 1996
[163] Budlender and Makgetla 'Equal Pay For Equal Work' January 1995

concerns about the lack of regulation of formal grading schemes. Existing legislation does not regulate job evaluation systems. As mentioned previously, employers employ female employees in specific job categories, and due to the lack of male comparators, women suffer greatly.

- Third, the hypothetical and non-contemporaneous male should be included as a valid comparator.

- fourth, the burden of proof should rest on the employer to prove that the wage differentiation is justified.

- Fifth, the act must address defences or grounds of justification in such a way that it clearly indicates which factors are justified.

- Sixth, the procedure should be simple and delay should be minimised. The CCMA should have a panel of commissioners specialising in this field. The process should be mediation, or in the event that this fails which arbitration with a review procedure by the labour court.

- Seventh, the green papers proposal to install an inspectorate as a sub-department in the Department of Labour must be implemented. The Sub-department would provide information and enforce pay equality in the workplace. It should be staffed by gender sensitive people who are familiar with the subject of pay inequality and able to detect indirect gender discrimination. The lower income and the non-unionised workers should have direct access to this unit.

- Eighth, The department of Labour must fund a training program at the workplace, which should include pay equality principles. This training should not only be directed at workplace discrimination but that which manifests itself outside the workplace.

- Nineth, once a applicant has received judgement in her favour, it should be made applicable to all the co-employees in that workplace.

- Lastly, a system successfully implemented in Sweden consists of state subsidies to employers to assist them in the initial stages of implementation of equity proposals. This also served as a incentive for employers to actively participate in the process.

It is believed that note will be taken of the foreign judgements and that extensive borrowing with perhaps only 'slight bending' will occur. We expect the legislation to be in line with EC, ILO standards, extending claims to include work of equal value, and thereby permitting applicants to challenge existing job evaluation systems.

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